January 18, 2011

VIA E-MAIL (comments@FDIC.gov)

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: ***Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") - Title II (Orderly Liquidation Authority)***

Dear Mr. Feldman,

The Capital Markets Committee (the "***Committee***") of the National Bankruptcy Conference (the "***Conference***") is responding to the request by the Federal Deposit Insurance Corporation (the "***FDIC***") made in the Federal Register, Volume 75, No. 201 (October 19, 2010), for comments as to the key areas of Title II of the Act that may require additional rules or regulations in order to harmonize them with otherwise applicable insolvency laws.

The Conference is a voluntary, non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

The Committee is one of several committees of the Conference. The Committee focuses upon the operation of bankruptcy and related laws in relation to the capital markets and the Uniform Commercial Code. The Committee is comprised of the individuals listed on Exhibit A.

The Committee has reviewed various provisions of Title II and compared those provisions to the federal Bankruptcy Code. In undertaking its review, the Committee has been guided by the core principles of the Conference. As a non-profit, non-partisan and self-supporting organization, the Conference is able to take impartial, principled positions on issues implicating bankruptcy law and policy. The Conference does not act on behalf of any specific client, organization or interest group, but rather seeks to reach consensus among its members (who represent a broad spectrum of political and economic perspectives) based on their knowledge and experience as leading bankruptcy practitioners, judges and scholars. The Committee's comments are submitted by the members of the Committee and not by the Conference as a whole.

In formulating its comments, the Committee has recognized that a number of provisions of Title II were derived from parallel provisions in the Federal Deposit Insurance Act which have no analogous parallel provisions in the Bankruptcy Code. However, the Committee understands from the FDIC's request for comments that, even considering the provisions of Title II derived from the Federal Deposit Insurance Act, there is still a need to harmonize other provisions of Title II with otherwise applicable insolvency law, including the Bankruptcy Code.

The Committee has identified on Exhibit B certain provisions of Title II where it believes that further clarification by rulemaking or technical statutory amendments to Title II may be desirable. In some cases, the provisions identified appear to be inconsistent with the provisions of the Bankruptcy Code without an apparent policy justification. In other cases, we have identified provisions of the Bankruptcy Code that resolve issues for which no resolution is indicated in Title II. Furthermore, we have noted various ambiguities, technical concerns and typographical errors for your consideration.

The Committee appreciates this opportunity to provide its comments. We remain available to address any questions relating to the comments or to explain them in further detail. Moreover, we are willing, as a general matter, to offer further assistance in this important process.

Respectfully Submitted,

Edwin E. Smith
Chair

## Exhibit A

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| **Hon. Thomas L. Ambro**<br>U.S. Court of Appeals, Third Circuit<br>Room 5300, Federal Building<br>844 King Street<br>Wilmington, DE 19801<br>***email:*** judge_thomas_ambro@ca3.uscourts.gov | **H. Bruce Bernstein, Esq.**<br>Sidley Austin LLP<br>Bank One Plaza<br>10 South Dearborn Street<br>Chicago, IL 60603<br>***email:*** bbernstein@sidley.com |
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**Exhibit B**

ORDERLY LIQUIDATION AUTHORITY
UNDER THE DODD-FRANK ACT

The following issues may benefit from clarification:

*Suspension of legal actions.*

Should the section 210(a)(8) stay exclude the exercise of police powers like those excluded from the automatic stay under Bankruptcy Code § 362(b)?

May the FDIC request an extension of the section 210(a)(8) stay or is 90 days the maximum period for the stay?

May the FDIC obtain the section 210(a)(8) stay from a single court or must it obtain the stay from each court in which a judicial action is pending?

The section 210(a)(8) stay is to be granted "as to all parties". Are there circumstances in multi-party litigation in which the stay should not cover claims asserted neither by nor against the covered financial company?

Section 210(a)(9)(D) states generally that, except as elsewhere provided in the Act, no court shall have jurisdiction over any claim for payment from or determination of a right against assets of a covered financial company. Does section 210(a)(9)(D) require the dismissal of all existing actions, including those stayed under section 210(a)(8) after the expiration of the stay under that section?

Section 210(a)(13) allows any court of competent jurisdiction to issue injunctions. Section 205(a)(2) refers to a "Federal district court of competent jurisdiction." Are the relevant courts federal courts generally, federal district courts, or any court, whether federal or state, that has competent jurisdiction? Beyond jurisdiction, should there be venue rules for the issuance of such injunctions?

*Rights and duties of the receiver.*

Under what circumstances will the receiver seek under section 210(a)(1)(E) to commence a separate OLA receivership against a special purpose subsidiary of a covered financial company when the special purpose subsidiary is the vehicle for a securitization and has no indebtedness and obligations other than those relating to the securitization?

Section 210(a)(1)(G)(i) permits the FDIC to transfer "any asset" of the covered financial company to another company without first obtaining approval or consent from any party. The subsection makes clear that this authority extends to assets "held by the covered financial company for security entitlement holders." Does this authority extend to assets subject to security interests as well?

Section 210(a)(1)(G)(ii) requires the FDIC to obtain prior approval from the relevant regulators to transfer assets. Will the stated deadlines (e.g., for the Attorney General or the Federal Trade Commission to issue a report on competitive factors) cover all of the relevant agencies? How quickly must regulators make their decisions?

If the FDIC "shall succeed" to the rights of stockholders under section 210(a)(1)(M), why was it necessary to say separately that the FDIC "shall terminate" the rights of stockholders against assets of the covered financial company? Perhaps it should be clarified that the intent was for the FDIC to be able to exercise the rights of stockholders in lieu of the stockholders being able to exercise those rights.

Sections 210(a)(3)(B), 210(a)(3)(D), 210(b)(1) and 210(b)(6) describe claims which must be "proven to the satisfaction of the receiver". Should there be clarification as to the applicable standard of proof?

Section 210(h)(7) refers to documentation being "acceptable to the receiver". Should there be further details as to the standards that the receiver will apply to determine whether documentation is acceptable? Is there a difference in the meaning between "acceptable to the receiver" in section 210(h)(7) and "proven to the satisfaction of the receiver" in sections 210(a)(3)(B), 210(a)(3)(D), 210(b)(1) and 210(b)(6)?

At common law a claim or defense of a contracting party arising out of the same transaction with the covered financial company would be considered to provide the contracting party with a right of recoupment while a claim or defense arising out of a separate transaction with the covered financial company would be considered to provide the contracting party with a right of setoff. Does the receiver's right to sell assets free and clear of setoff rights under section 210(a)(12)(F) exclude or include rights of recoupment? (Most courts have interpreted Bankruptcy Code § 553 not to address rights of recoupment.)

Typically a lending agreement will contain, as a condition to the extension of credit, that no default has occurred under the lending agreement. Does the receiver's ability under section 210(c)(13)(D) to enforce contracts to extend credit require the lender to extend credit even if one or more defaults have occurred other than the appointment of the receiver?

Section 210(d)(2) limits the liability of the FDIC in its capacity as receiver but also "in any other capacity." What potential liabilities against the FDIC is the latter reference intended to limit?

Section 210(d)(4)(A) authorizes additional payments or credits "if the [FDIC] determines that such payments or credits are necessary or appropriate to minimize losses to the [FDIC] as receiver from the orderly liquidation of the covered financial company under this section." Are these determinations to be made ad hoc by the FDIC on a case by case basis or does the FDIC intend to provide in advance regulatory guidance or rules in addition to the rule regarding short-term debt?

*Claims estimation and guaranties; valuation.*

How will pre-receivership obligations that are contingent, unmatured, or otherwise not yet "due and payable" be treated for distribution purposes in relation to those claims on which distributions are to be made under section 210(a)(1)(H) as "due and payable at the time of the appointment"?

Section 210(a)(4) refers to "judicial determination of claims". Does judicial determination suggest that the disallowance of a claim by the receiver will be subject to judicial review or *de novo* determination? If judicial review, what form of judicial review is contemplated?

Section 210(c)(3)(E) permits the receiver to set forth by rule-making how a contingent claim will be estimated. Although a guaranty claim in a bankruptcy case would be allowed in the full amount, section 210(c)(3)(E) suggests that the guaranty claim would be estimated in an OLA receivership. Was this variance from the Bankruptcy Code intended? Should claims otherwise be estimated under section 210(c)(3)(E) only to the extent that they would be estimated in a bankruptcy case under Bankruptcy Code § 502(c)?

Section 210(d)(2)(B) limits claim liability to what would have been received if . . . "the covered financial entity had been liquidated under chapter 7 of the Bankruptcy Code . . . or any similar provision of State insolvency law applicable to the covered financial company." Which of chapter 7 or a similar state insolvency law controls if both could apply?

In determining the value of the covered financial company's assets for purposes of section 210(d)(2)(B), should the effect of the collapse of the financial system itself due to the covered financial company's failure (in a hypothetical chapter 7 case absent OLA "rescue") be taken into consideration?

Unlike Bankruptcy Code § 1129(a)(7) (which ties the hypothetical liquidation date to the effective date of the plan) and section 210(d)(3) (which ties the hypothetical liquidation date in a SIPIC proceeding to the date on which the FDIC is appointed receiver), section 210(d)(2)(B) does not specify a date of the hypothetical liquidation. Should a date be specified?

Is the prohibition upon a claimant receiving more than the "face value amount of any claim" in section 210(d)(4)(B)(i) intended to be different than the notion of impairment and non-impairment under Bankruptcy Code § 1124?

*Pre-commencement contracts subject to repudiation.*

Under section 210(c)(2), what is a "reasonable time" in which the receiver must decide whether to repudiate or approve a contract?

What is the effect of the receiver failing to repudiate or approve a contract within a reasonable time, i.e., is the contract repudiated, or is it approved, if the receiver takes no action within a reasonable time? Does the receiver's inaction cause the contract to become an administrative liability of the receivership estate?

In order to avoid a negative implication that the acceptance of performance under a contract other than a services contract will preclude a subsequent repudiation of the non-services contract, should the provision in section 210(c)(7) that the receiver's acceptance of services in connection with a services contract will not affect the receiver's right to repudiate that contract after such performance be broadened to include the acceptance of performance under any contract?

Because of sections 210(a)(7)(B) and 210(b)(4), would an oversecured creditor, whose secured obligations are repudiated, be entitled to recover post-repudiation interest and attorneys' fees to the extent of its "equity cushion" as under Bankruptcy Code § 506(b) notwithstanding section 210(c)(3)(D)?

*Financial contracts.*

Section 210(c)(8)(C) contains avoidance protection for certain transfers in connection with a qualified financial contract. However, under section 210(c)(8)(C)(ii) there is no protection "if the *transferee* had actual intent, to hinder, delay, or defraud" (emphasis added). The parallel provision in Bankruptcy Code § 548(a)(1)A) and analogous state fraudulent transfer law is based on the intent of the *transferor*. The reference to the transferee instead of the transferor appears to be a drafting error, but in any event the provision should be clarified.

Under the Bankruptcy Code definitions of protected financial contracts (repurchase agreements, swap agreements, securities contracts, forward contracts and commodity contracts), a security agreement may be a protected financial contract "not to exceed the damages in connection with any such agreement

or transaction, measured in accordance with section 562". That phrase is omitted from the definitions of qualified financial contracts in section 210(c)(8). Should it be clarified, as was the effect of the omitted phrase, that a security agreement is a protected contract itself only to the extent that it secures claims arising from a protected contract?

*Security interests.*

Should the terms "security interest" and "security entitlement" be defined? Is the intent for the term "security interest" to have the same meaning as in the Bankruptcy Code § 101(51) and for the term "security entitlement" to have the same meaning as in Article 8 of the UCC.?

When and how is a secured creditor's collateral valued for purposes of determining its secured claim and what standard is used in the valuation? How does the timing and valuation standard relate to section 210(b)(5)'s reference to the amount "realized" from the collateral?

Section 210(a)(1)(M) terminates all rights that a creditor may have against assets of the covered financial company. Does this mean that a secured creditor may not assert non-judicial remedies against collateral once a receiver is appointed, for example, even if the collateral is under the secured creditor's possession or control or may be collected or disposed of by non-judicial procedures?

*Avoidance powers.*

Clause (II) of section 210(a)(11)(A)(i) should have been inserted in (A)(ii) in order to be consistent with Bankruptcy Code § 548 and any applicable state fraudulent transfer law. See, e.g., Bankruptcy Code § 548(a)(1) and the Uniform Fraudulent Transfer Act § 4. Clause (II) of section 210(a)(11)(A)(i) should read "transfer or obligation" rather than "transferor obligation". These appear to be drafting errors. To what extent may they be corrected by rule-making?

The rule of construction in section 210(a)(11)(H) for determining when a transfer is made applies a "good faith purchaser" test for all fraudulent transfers and preferences. However, Bankruptcy Code § 547(e)(1)(B) applies a "judicial lien creditor" test for preferences of personal property and fixtures. In addition, Bankruptcy Code § 547(e)(2)(A) provides a 30 day post-attachment grace period for an alleged preferential transfer to be considered to have been made at the time of attachment if perfection is achieved in the grace period. Section 210(a)(11)(H) contains no such grace period. Presumably section 210(a)(11) should conform to Bankruptcy Code §§ 547(e)(1)(B) and (2)(A) for preference purposes?

Section 210(a)(11)(A), like Bankruptcy Code § 548(a)(1)(A), permits a receiver to avoid an intentional fraudulent transfer on an actual creditor of the covered financial company. However, Section 210(a)(1)(M) would appear to terminate the creditor's right to look to an asset of the covered financial company. To what extent does section 210(a)(1)(M) prevent the receiver from recovering an intentional fraudulent transfer under section 210(a)(11)((A)?

Similarly, Title II does not appear to have a provision similar to Bankruptcy Code § 544(b). To what extent does the receiver have the right to step into an actual creditor's shoes to avoid a state law fraudulent transfer? Even assuming that the receiver has such a right, does section 210(a)(1)(M) preclude the receiver from exercising it?

Section 210(a)(11)(F)(i) seems to afford an avoidance defendant the same defenses that it would have under Bankruptcy Code §§ 547, 548 and 549, but not under Bankruptcy Code § 550. Section 210(a)(11)(E) does give the defendant the right to certain defenses arising under Bankruptcy Code §

550(a). To what extent is an avoidance defendant entitled to assert the anti-Deprizio defense in Bankruptcy Code § 550(c), a single satisfaction defense under Bankruptcy Code § 550(d), a lien on improvements in Bankruptcy Code § 550(e), or a statute of limitation defense under Bankruptcy Code § 550(f)?

Should there be a provision by which the claims of an avoidance defendant are disallowed, as in Bankruptcy Code § 502(d), until the transfer subject to avoidance is paid or returned?

Does an avoidance defendant have a reinstatement claim for a transfer that is avoided? See Bankruptcy Code § 502(h).

Does the receiver have the right to avoid a statutory lien? See Bankruptcy Code § 545.

Should there be there a fraudulent transfer exclusion in section 210(a)(11)(A) for charitable donations as in Bankruptcy Code § 548(a)(2)?

Does the receiver have a right to preserve a lien for the benefit of the estate? See Bankruptcy Code § 551. (Without it, if property is subject to a first and second lien, avoidance of the first lien may result only in elevation of the second lien.)

*Statute of limitation.*

Should there be a statute of limitation on avoidance actions? See Bankruptcy Code § 546(a).

What is the statute of limitation on a cause of action revived under section 210(a)(10)(C)? Is it the three-year period referred to in section 210(a)(10)(A) as supplemented by (B)?

*Foreign investigation and cooperation.*

Should it be clarified in section 210(k), as it is in § 1818(v)(1)(B) of the FDIA, that an office may be maintained outside of the United States to conduct an investigation, examination or enforcement?

*Insurance companies*

Section 203(e)(1) refers to the possibility that an insurance company that is a covered financial company may be rehabilitated even though a covered financial company that is not an insurance company would be liquidated in an OLA proceeding. Was the rehabilitation possibility intended?

Section 203(e)(3) specifies the procedure for placing an insurance company into orderly liquidation. This section specifies that if the appropriate state regulatory agency has not filed a petition for orderly liquidation of an insurance company at the end of 60 days after the determination by the Secretary to invoke orderly liquidation under section 202(a), the FDIC may "file the appropriate judicial action in the appropriate State court to place such company into orderly liquidation under the laws and requirements of the State." It is not clear, however, whether the FDIC or the recalcitrant regulator would be the receiver in such a proceeding. If the receivership is to be done "under the laws and requirements of the State" then the local regulator would be the receiver. *See* New York Ins. Law §§ 7403, 7405; Conn. Gen. Stat. §§ 38a-915, 38a-920; Cal. Ins. Code §§ 1011, 1016. However, since it is likely that the local regulator intentionally failed to act, Congress may have intended to have the FDIC serve as receiver. It would be very helpful if this point could be clarified as to whether the local regulator or the FDIC is intended to be the receiver.

If the FDIC is to serve as receiver, would the FDIC be able to do so if only the local regulator is authorized under state law to act in that capacity?

*Errata*

Section 210(a)(1)(A) gives the FDIC the "rights, titles, powers, and privileges" of "any stockholder." Section 210(a)(1)(B) states that the FDIC, as receiver, may operate the financial company "with all the powers of the ... shareholders." Section 210(a)(1)(C) states the Corporation may "provide for the exercise of any function by any ... stockholder." Do the terms "stockholder" and "shareholder" mean the same thing in all cases?

Various provisions of Title II refer to a security interest differently. Sections 210(a)(1)(D), (a)(3)(D)(iii) refer to "legally enforceable and perfected" security interests. Sections 210(a)(5)(A)(i) refers to "legally valid and enforceable or perfected" security interests. Section 210(c)(12)(A) refers to "legally enforceable or perfected" security interests. Section 210(c)(14)(B) refers merely to "security interest". Is a different or the same meaning intended in these provisions?

Section 210(a)(7)(A) refers to the receiver acting "in its discretion" but section 210(a)(7)(C) refers to the receiver acting "in its sole discretion". Is a different or the same meaning intended?

Section 210(a)(7)(A) refers to the receiver paying "claims" that are "allowed" but section 210(a)(7)(C) refers to the receiver paying "dividends" on "proven" claims. Section 210(b) also refers to "proven" claims. Is a different or the same meaning intended?

In section 210(b)(1)(D) it should be clarified that the phrase "less the aggregate amount paid to such employees under subparagraph (C), plus the aggregate amount paid by the receivership on behalf of such employees to any other employee benefit plan" means that the latter amount is deducted rather than added to the employees' priority claims.

Section 210(c) refers in some places to the receiver "disaffirming" a contract and in other places to the receiver "repudiating" a contact. Is a different or the same meaning intended?

In section 210(c)(8)(D)(vii) the word "contact" should be "contract".

Section 210(m)(1)(A) requires the FDIC to apply the distribution rules of Subchapter III of chapter 7 of the Bankruptcy Code when the covered financial company is a stockbroker. Section 210(m)(1)(B) requires the FDIC to apply the rules of Subchapter IV when the covered financial company is a commodity broker. Both of these subsections use the terms "customer" and "customer property and member property." Section 210(m)(2)(A) goes on to say that these terms should "have the same meaning as in sections 741 and 761" of the Bankruptcy Code, but these sections of the Bankruptcy Code give different definitions for the terms "customer" and "customer property." It is implicitly clear that § 741's definitions apply to section 210(m)(1)(A) (for stockbrokers) and § 761's apply to section 210(m)(1)(B) (for commodity brokers) but perhaps this should be expressly stated.